INDEX.

AUTHORITIES.

In the Supreme Court of the United States.

OCTOBER TERM, 1922.

THE PORTSMOUTH HARBOR LAND AND HOTEL COMPANY et al., appellants,
v.
THE UNITED STATES.
No. 97.

APPEAL FROM THE COURT OF CLAIMS.

STATEMENT.

This is the third of a series of suits brought by the Portsmouth Harbor Land and Hotel Company and other claimants against the United States arising out of the firing of guns from the same fortification. The two previous suits were decided in favor of the Government. (*Peabody* v. *United States*, 231 U. S. 530; *Portsmouth Harbor Land & Hotel Co. et al.* v. *United States*, 250 U. S. 1.)

Between 1898 and 1901 the Government constructed a battery upon a site which it had commenced to fortify 25 years before. This battery is upon land which is in the main separated from the ocean by property which is now owned by the appellants.

In 1902 three of the guns were fired over land to which the appellants claimed title. They brought action in 1905 upon the ground that by such firing the Government had "taken" their property. The suit was tried in the Court of Claims in the latter part of 1910, and was decided in favor of the Government. The decision was affirmed by the Supreme Court in December, 1913, in an opinion by Mr. Justice Hughes. (*Peabody* v. *United States*, 231 U. S. 530.)

Eighteen months later the appellants again sought recovery, alleging a few subsequent acts of gunfire, but the Court of Claims held that there was no possible difference between the second case and the first case and rejected the claim. (53 Ct. Clms. 210.) This court affirmed the judgment of the Court of Claims. (250 U. S. 1.)

Nine months later the appellants instituted the present (third) suit, alleging the identical acts of gunfire which had been considered by this court in the earlier actions, and alleging further that on the 8th day of December, 1920, the Government had discharged guns over their property, that on other occasions guns had been pointed over their land, and that the Government had established a fire-control station and service on the land.

The claimants asked judgment for rent for the use of the land during all of the period since the firing involved in the first case, except in so far as the statute of limitations interposed a bar, and for the value of the property taken: or, if the United States

should abandon the fort, for the amount of rental plus damages for impairment of the value of the land, saying in paragraph 11 that the value of the property at the date of the disestablishment of the fort should be deducted from this sum, and in paragraph 12 claiming the sum without deduction.

The petitioners also in this third suit invoked the equitable jurisdiction of the Court of Claims for the correction of alleged erroneous findings of fact in the second of this series of suits.

On demurrer the petition was dismissed. The claimants thereupon brought this appeal.

ARGUMENT.

I.

ESSENTIAL QUESTION INVOLVED.

The essential question is whether the firing of guns over the land of the claimants in December, 1920, and the establishment of a fire-control station on a relatively small portion of the land, constitutes a taking or continuous using of the entire land of the claimants.

The firing of guns in December, 1920, did not constitute a taking of the land.

The appellants show firing of the guns upon only one occasion since November, 1915. Upon that single occasion, so far as appears, each of the coast-defense guns was fired once. The firing was in midwinter, over land which, according to the appellants, is of little or no value except for purposes of summer residence (R. 9, 10), and the firing occurred after the

hotel had been razed. (Appellants' brief, p. 27.) It is not alleged that the Government had razed the hotel.

The decision of this court in *Peabody* v. *United States* (231 U. S. 530), followed in *Portsmouth Harbor Land & Hotel Co.* v. *United States* (250 U. S. 1), supports the position taken by the Government that such firing did not constitute a taking of the land. In this connection the court is asked to consider, not possible interpretations of the pleadings of the parties, to which the appellants' brief refers, nor an erroneous syllabus, but the reasons which were given by the court itself for its decision.

The court in the first decision pointed out that guns had been fired over the land of the claimants and then demonstrated the unsoundness of the contention of the claimants that because guns had been placed in position and some firing had been done much more firing over their land was to be expected. (See pp. 537, 538, 540.)

Thus the court called attention to the finding by the court below that an intention of the Government to fire its guns over their land in time of peace had not been shown

> "excepting as such intention can be drawn from the fact that the guns now installed in said fort are so fixed as to make it possible so to do and the further fact that they were so fired upon the occasions as hereinbefore found." (Pp. 537, 538.)

The Supreme Court then pointed out that the appellants had assumed that practice firing over

their land was necessary, but replied that the facts of the case showed that this was not true. It added (p. 540):

> That there is any intention to repeat it does not appear but rather is negatived. There is no showing that the guns will ever be fired unless in necessary defense in time of war. We deem the facts found too slender a basis for a decision that the property of the claimants has been actually appropriated and that the Government has thus impliedly agreed to pay for it.

But the portion of the opinion which is most helpful in solving the case now before the court must be found not in the passages in which the court pointed out that the claimants had shown nothing from which future firing over their land in time of peace could be anticipated, but rather in the following sentence (p. 538):

> It may be assumed that *if* the Government had installed its battery, not simply as a means of defense in war, but with the purpose and effect of subordinating the strip of land between the battery and the sea to the right and privilege of the Government to fire projectiles directly across it for the purpose of practice or otherwise, whenever it saw fit, in time of peace, with the result of depriving the owner of its profitable use, the imposition of such a servitude would constitute an appropriation of property for which compensation should be made.

Judged by this test, the firing in 1920 did not constitute any appropriation of the appellants' property.

Five years had elapsed since the last previous firing and then on this midwinter day, when the ground was unoccupied and the summer hotel had been razed, guns were discharged on one occasion and one occasion only over a deserted tract of land. Certainly this isolated instance of firing did not deprive the claimants of the "profitable use" of their land.

The first firing from the fort was done in June, 1902, and was over an existing summer resort; and most of the other previous instances of firing were in summer time. Then, if ever, occurred the injury to the summer resort. And yet this court has already decided unanimously in two cases that the Government had not thereby taken the land of the claimants. The only firing which the court has not already passed upon is the firing involved in the present suit, and in this case it appears most clearly from the record that the one instance of firing in question in December, 1920, could not have interfered with the use of the land for the purposes to which it was adapted.

Moreover this isolated instance of firing did not justify the possible assumption, referred to as a possible premise by this court in its opinion in the first case, viz, that the Government intended to discharge guns over the land of the appellants for practice or otherwise "whenever it saw fit."

The petition shows that the guns were dismounted after the United States entered the World War, apparently for the purpose of sending them to France (R. 3), and that after the Armistice, between February, 1920, and March, 1921, the United States set up coast-defense guns in the fort and discharged those guns in December, 1920. (R. 3, 4.) There is nothing in the petition to negative the natural inference from these facts that the World War caused such a disarrangement of the guns or their mountings that after new guns had been installed or old guns reinstalled it was necessary to make one firing from each gun to ascertain whether the complicated mechanisms of the guns and their mountings had been placed in good working order. The Government did not discharge the guns until midwinter, when the discharge could not occasion any possible inconvenience to the appellants. Under the circumstances it can not be said that the Government showed any intention to fire over the land "whenever it saw fit." On the contrary, the entire absence of gun firing during the summer season during these five years seems to indicate that the War Department did not wish to injure the appellants' property.

The pointing of unloaded guns over the land of the appellants did not constitute any taking or using of those lands.

Such a pointing of the guns did not even create any reasonable fear that they would be discharged. It is true that if a man lifts a gun to his shoulder and

points it toward another man in a threatening manner, thereby putting the other man in fear, a tort is committed. But the pointing of the guns of this fort did not involve a threat nor did they cause any reasonable apprehension that they would be discharged. Guns are often mounted for defensive purposes for use in the remote event of a war. Between November, 1915, and the filing of the amended petition in March, 1921, while the guns were pointed frequently, they were fired upon only one occasion, and then under such circumstances that the appellants could not have been materially disturbed thereby. The attendant circumstances must have led anyone who was acquainted with them to realize that the movements of the guns were not preludes to their discharge and that the guns would not be discharged inconsiderately.

And there are other considerations which would have led to the same conclusion.

The discharge of a coast-defense gun involves a large expenditure of money. The interests of the Government demand that it should not be done unnecessarily; and, except under very unusual circumstances, their discharge would be not only expensive but inexcusably so.

As everyone must know, the duty of the man who handles such a gun is not to aim at a target seen by himself but to point the gun at the precise angles determined for him by a man who in turn may not see either the target or the gun when he gives the

orders. The duty of the man at the gun is to point it accurately and promptly in accordance with orders. He can be trained to do such work without the discharge of a single shell, and this work can be thoroughly appraised without the expenditure of a single cent for gunpowder.

It has not been shown that it is necessary to test the guns at the fort to which they are assigned or to practice firing at that fort. In *Peabody* v. *United States* (231 U. S. 530, 539, 540) this court said:

> The petitioners' argument assumes that the guns, for proper practice, must be fired over the land in suit and, hence, that this burden upon it was a necessary incident to the maintenance of the fort. The fact of the necessity of practice firing is said to be established by the finding with respect to the line of fire over the Government's portion of the shore in which it is said that this would be sufficient "for purposes of practice and for all other necessary purposes in time of peace." But, in the light of other findings, this is far from affording a sufficient foundation for the conclusion upon which the petitioners insist. On the contrary, that no such necessity as is now asserted can be assumed from the mere fact that the fort is maintained is demonstrated by the facts of this case. This suit was tried in the latter part of the year 1910, and it appeared that none of the guns had been fired for over eight years. When the suit was brought in 1905, nearly two years and a half had elapsed since the firing of a shot. The guns have been fired only upon two occa-

> sions, or three times in all, and this firing took place in 1902, shortly after the installation of the guns, for the purpose of testing them. *It may be that practice in firing the guns would be highly desirable, but it is too much to say upon this record that the fort would be useless without it. Nor are we at liberty to conclude that the Government has taken property, which it denies that it has taken, by assuming a military necessity in the case of this fort which is absolutely contradicted by the facts proved.*

Gunners are given experience in the actual discharge of projectiles at fortifications where the facilities for training are best and where there is least objection and complaint by near-by residents on account of the noise and concussion resulting from practice firing, and *they are not given practice firing at forts where there would be serious objection and complaint against it.* (Record, p. 24, Finding of Court of Claims in second case.)

The appellants may not have read what this court said concerning practice firing in the first of these cases. They may not have read what the Court of Claims said about it in the second case. But after they had observed that guns which were pointed over their land on numerous occasions were discharged on only one occasion after November, 1915, five years later, in fact, and that this firing was in midwinter over a deserted tract of land, they should not have thought that the mere pointing of the guns indicated that they would be discharged inconsiderately.

The United States has not made any admission inconsistent with this position.

It is true that the petition alleges that the United States has set up the guns with the intention of firing and pointing them across the land of the claimants, but this allegation does not show that pointing of the guns should arouse any apprehension that they will be fired when pointed.

The appellants' brief (p. 29) also quotes the following passage as contained in their petition and admitted by the demurrer:

> It was needful to the United States in the use of said fort to fire the guns thereof across the claimants' land at any and all times in time of peace and at all times for practice to fire the guns across said land and through the column of air superincumbent thereon; and it was needful for the proper efficiency of said guns that the said guns be kept in readiness for accurate use by the United States and that they be used for practice from time to time continuously.

But that statement was made in the petition in the appellants' second suit, which was brought in 1915 and decided in favor of the Government in 1919 (250 U. S. 1). It was not made in the petition in the present case unless brought in by reference where it is said that the petition in the former suit is—

> requested to be taken as if incorporated herein at this point, and all the material facts and descriptions therein contained are hereby reaffirmed and stated by your petitioners. (R. 2, 3.)

It is submitted that the statement made in the brief for appellants was not made in their present petition in the sense in which they now quote it.

The cross-reference to the second suit was made in the petition in the present (third) suit when that petition was originally filed in February, 1920. At that time the petitioners did not cite a single instance of firing after November, 1915. In March, 1921, they amended their petition. In this amendment they say that the guns have been raised and pointed at frequent intervals, but the only allegation as to the actual firing of guns related to the firing on December 8, 1920, separated from the firing of 1915 by an interval of five years. Therefore, it seems that the paragraph as to practice firing quoted from page 29 of the appellants' brief, expressed in the past tense, and expressed in the past tense in the petition filed in the second case, must refer to conditions considered by the court in the second case, and must be alleged in connection with the contention of the appellants that while this court had twice decided that the United States had not taken the lands, the Government nevertheless had used the lands and but for the statute of limitations would owe rent for the use of that land back to the year 1902.

The statement as to practice firing which is quoted in the brief can not be regarded as relating to the period since November, 1915. Otherwise, it is not in accordance with the facts.

The establishment of a fire-control station and service does not justify a recovery in the present case.

The appellants' petition shows that such a station and service were established, but it does not show of what they consisted. For all that appears in the record, it is possible that all that was done was that men went upon the appellants' land on a couple of occasions and from that vantage point gave directions to the gunners. Such a using of a few square feet of deserted land for a few minutes might be a trespass, but it would not constitute a taking of the land.

The petition does show that in 1919 the Government offered to purchase a portion of the land; but it does not show that the offer was accepted, and it does not show that the United States attempted to make permanent use of the portion which it had offered to buy. Moreover, even if the United States has attempted to make permanent use of a portion of the land, which is nowhere alleged, it certainly does not follow that the Government was obliged to pay for the entire land of the appellants; and the appellants have not limited their claim to the small portion of the land which would be involved.

The contention that the Government is liable for its use of the fort during the period covered by the decisions of this court in the two former cases does not call for serious consideration.

The claim that the United States should pay rent for the use of the property of the appellants from the date of the establishment of the fortification down to the present time, except in so far as the statute of limitations imposes a bar, is simply a presentation in a

new form of a question which has been twice decided by this court. As such, the case is *res adjudicata*. If the acts involved in the two previous suits did not involve a taking of the land, it seems clear by parity of reasoning that those earlier acts did not involve a using which rendered the Government liable for the payment of rent through those years. Even if it should be held that the acts and incidents involved in the present suit subject the United States to liability, that liability is not thereby extended back over prior years. This is not an action of tort, and for that reason it is not necessary to consider whether a later trespass could be so bound up with prior acts as to make the entire course of action a *trespass ab initio*. If the acts involved in this suit create any liability on the part of the Government, that liability clearly is not retroactive.

Moreover, the conduct of the appellants has not been consistent with the claim which they now set up. If the Government had either rented or taken the property, the appellants would have had no right to use the hotel and other property involved after the taking occurred or the renting began, and they would have had no right to tear down the hotel if it or the use of it had belonged to the Government.

The actions of the Government in connection with this fort do not collectively constitute a taking or continuous using of the appellants' land.

If, when considered by themselves, the actions of the Government since the decisions in the two previous cases do not render the Government liable, they

do not constitute a taking or continuous using of the land when considered in connection with the acts involved in the two previous cases, as to which no liability attached.

The several instances of firing brought out in the three cases, if they had not been separated by long intervals of time and if not otherwise explained, might in the aggregate be regarded as proof that the guns had been discharged for practice purposes. But it has been shown in the two previous suits that the firing there considered was not for the purpose of practicing (*Peabody* v. *United States*, 231 U. S. 530, 537; *Portsmouth Harbor Land & Hotel Co.* v. *United States*, 53 Ct. Cls. 210, 216; R. 24, 25), and the most natural inference from the facts set forth in the petition in the present case is that there was another reason for discharging the guns. (P. 7, supra.)

It is true that the appellants' brief repeatedly suggests that there might have been more firing if suits had not been pending, but such suggested reasons are not equivalent to actual firing. Moreover, it may be pointed out that the appellants brought the present suit before there had been any fresh instance of firing and that the firing was done when necessary regardless of the pendency of the suit.

It has not been shown, either by separate incidents or by the course of events, that any of the actual firing from this fort has been done for the purpose of practicing.

II.

CORRECTION OF ALLEGED ERRONEOUS FINDINGS OF FACT IN THE SECOND SUIT.

It is submitted that the only matter in issue in this suit is the conduct of officers of the Government which this court has not already considered in the two previous cases.

The appellants, however, contend that the Court of Claims erred in denying an application in equity for the correction of alleged erroneous findings of fact in the second suit. While those findings can have no bearing upon the present action, and while the sole basis for the equitable relief sought was presented to this court in the second suit in a motion to remand which was denied (250 U. S. 1), the Government feels that the method of practice which the appellants are attempting to establish would be so subversive of orderly procedure in the Court of Claims as to justify a defense of that court's action in refusing to grant their request.

The Court of Claims committed no error in denying the present application to its equitable jurisdiction to correct alleged erroneous findings of fact in the preceding action at law.

THE FACTS.

In the first of this series of cases, after the decision of the Court of Claims, the claimants filed three separate motions for new trials, and after those three motions had been overruled they appealed to this court.

In the second case, according to their allegations in this third case (R. 4–5, 18–19), one of their counsel of record by mistake, and through a misunderstanding of the intention of the principal attorney, took and perfected an immediate appeal from the judgment of the Court of Claims and, in consequence, the findings of that court were not reviewed therein in the usual manner on motion for new trial or rehearing.

It may be pointed out that in the second case the claimants filed in this court a motion to remand the case to the Court of Claims for additional and amended findings, and incorporated in their application an affidavit as to the circumstances of the immediate appeal which also appears in the third case as Exhibit D. Concerning the application to remand, this court, speaking by the Chief Justice, said (250 U. S. 1, 2):

> The record discloses no ground for the applications here made to remand and for additional findings.

In their petition in the third suit the claimants allege that by reason of the misunderstanding as to the taking of an appeal the Court of Claims in the second case had no opportunity to correct various errors in the findings, some of which, it is alleged, were contrary to the evidence submitted and others stated as facts things physically impossible. And the Court of Claims was requested in the third case, in the exercise of its equitable powers, to set aside the findings in the second case in so far as they worked

inequity upon the claimants and to make necessary amendments and corrections.

APPELLANTS' MOTION TO REMAND IN THE SUIT IN WHICH THE DISPUTED FINDINGS WERE ENTERED.

After the docketing of the appeal in the second case in this court the Court of Claims could not grant a new trial. (*Ex parte Russell*, 13 Wall. 664, 670, 671; *Ex parte Roberts*, 15 Wall. 384, 387; *Monroe* v. *United States*, 37 Ct. Cls. 79.) The claimants, however, filed in this court a motion to remand the case to the trial court for additional and amended findings. They incorporated in their motion to remand the identical affidavit concerning the premature filing of the appeal which appears as Exhibit D of the present petition.

This motion was denied (250 U. S. 1, 2).

NO GROUNDS FOR EQUITABLE RELIEF WERE SHOWN IN THE PETITION.

Despite this direct decision by this court, the claimants again urge this tribunal to direct the Court of Claims to amend its findings in the second suit. And they further assert that the Court of Claims erred in refusing in the present action, as a court of equity, to set aside those findings and make corrected ones. All this presents a *res adjudicata*.

Assuming for the moment that the Court of Claims had equitable power in the premises, did the petition make such a showing as would have warranted the court in granting the relief prayed? It should be

borne in mind that the challenged findings were made in an action at law. The appellants' view is that where a law court by *mistake* adopts erroneous findings and by *accident* is denied opportunity to correct such findings, a case for equitable interposition is presented. (Appellants' brief, p. 29.) But it is well settled that equity will not give relief simply because of mistake or error in a judgment at law, or because a court of equity in deciding the same questions might have come to a different conclusion than the law court. (Story, Equity Jurisprudence (14th ed.), vol. 3, par. 2042, p. 590.)

Nor can appellants successfully base their claim for relief upon the ground of accident, for this court has said that one who seeks relief in equity against an adjudication at law on the ground of accident or mistake alone, unmixed with fraud (and there is no allegation of fraud in the present case), "*must show entire freedom from fault or neglect on the part of himself and his agents.*" (*Pickford* v. *Talbott*, 225 U. S. 651, 658. See also *United States* v. *Ames*, 99 U. S. 35; *Crim* v. *Handley*, 94 U. S. 652.) How appellants can claim, as they do, an entire absence of fault or neglect under the circumstances of the case, it is hard to conceive. If they were in any way prejudiced by their failure to have the Court of Claims review its findings, it was solely because of the precipitancy of their counsel.

Since the practice of awarding new trials in courts of law has become established, equity has become more and more reluctant to review adjudicated cases

at law. Appellants had their opportunity in the court of law to secure a review of the challenged findings, and their loss of that opportunity, whether through inattention, neglect, or poor judgment by their counsel, can hardly form a sufficient basis for a court of equity to deprive the Government of the benefit of its judgment.

THE LIMITED EQUITABLE JURISDICTION OF THE COURT OF CLAIMS SHOULD NOT BE EXTENDED TO PERMIT THE GRANTING OF A FORM OF RELIEF WHICH CONGRESS HAS INDICATED THE COURT SHOULD WITHHOLD FROM THE PRIVATE LITIGANT AND WHICH WOULD RENDER IMPOTENT RULES PRESCRIEED BY SAID COURT.

The equitable jurisdiction of the Court of Claims is, at most, a very limited one. It may, it is true, re-form a contract where that is necessary to enable it to award a money judgment for breach of the contract as re-formed. (*United States* v. *Milliken Imprinting Co.*, 202 U. S. 168.) But, on the other hand, this court has said that the Court of Claims is without power "to grant a decree for specific performance or exercise the peculiar powers of a court of equity." (*District of Columbia* v. *Barnes*, 197 U. S. 146, 152.) Thus, in *United States* v. *Jones* (131 U. S. 1), where the appellees had purchased certain timber lands from the United States, it was held that the Court of Claims could not compel the issuance and delivery by the Government of patents for those lands.

That such a method of procedure as is here attempted to be established by the appellants was not only not contemplated by Congress in defining the jurisdiction and powers of the Court of Claims, but was, impliedly at least, recognized by that body as being denied to the private litigant is established by the language of section 175, Judicial Code, which reads:

> The Court of Claims, at any time while any claim is pending before it, *or on appeal from it, or within two years next after the final disposition of such claim*, may, *on motion on behalf of the United States*, grant a new trial and stay the payment of any judgment therein, upon such evidence, cumulative or otherwise, as shall satisfy the court that any fraud, wrong, or injustice in the premises has been done to the United States * * *. (Italics ours.)

This section provides the Government a remedy of practically the same nature as a suit in equity to avoid fraud, wrong or injustice practiced in an adjudicated action at law. (See *Ex parte Russell*, 13 Wall. 664, 669.) The silence of Congress as to a like remedy for the defeated private litigant is peculiarly significant.

A decision extending the limited equitable jurisdiction of the Court of Claims so as to embrace such a proceeding as the present one would mean not only that there is no potency or meaning in the rule of the Court of Claims requiring, at least so far as the private litigant is concerned, that a motion for amendment or correction of its findings of fact must be

made within 60 days from the date of judgment, but that a jurisdiction was being conferred upon that court which Congress indicated should be withheld from it. Under such a holding a defeated claimant would be permitted to allow the findings of the Court of Claims to go unchallenged for a period suiting his pleasure, and then, when the case had long since become hazy in the minds of court and Government counsel and was thought to have been fully adjudicated, institute an equitable proceeding having for its object the complete overturning of the findings in the previously decided action at law. Such a practice would not only be destructive of orderly procedure in the Court of Claims, but a source of never-ending litigation. What a noted legal writer has said in another connection may well be said here, "Appeals must terminate, controversies must cease, discussions must end, and the business of life proceed." (Sedgwick, Construction of Statutory and Constitutional Law, 2d ed., p. 154.)

THE PRESENT APPLICATION, LIKE THE MOTION TO REMAND IN THE PRECEDING SUIT, PRACTICALLY REQUESTED A NEW TRIAL IN THE COURT OF CLAIMS; BUT THIS COURT HAS HELD, AS TO THE PLEA TO REMAND, THAT THERE WAS NO GROUND FOR SUCH APPLICATION.

Like a special verdict by a jury, it is only where there is obviously *no* evidence to support a finding of fact by the Court of Claims, or where a finding is *inconsistent* with other facts found, that this court will consider itself as not bound by the same. (*Hatha-*

way & Co. v. *United States*, 249 U. S. 460, 463.) Appellants, however, can hardly raise such questions at this time, for they moved in this court in the action in which the challenged findings were made to have the case remanded "for such other findings and amendments of findings as to the Court of Claims shall seem proper." In other words, what they practically asked for in their motion to remand was that this court should order a new trial in the Court of Claims. But this court in plain and unmistakable language said that the record disclosed no ground for the application to remand. (250 U. S. 2.) How, then, can the appellants stand in any better position in their present effort to induce this court, in effect, to direct the Court of Claims to grant them a new trial?

CONCLUSION.

This court may wonder why the Government is at such pains to demonstrate the unsoundness of the appellant's contention; but if this court should, under the circumstances of this case, allow a recovery on the theory of a taking, because of the anticipated use of coast defenses, it is difficult to see where such a decision would stop.

Sandy Hook is one of the most powerful coast defenses in the world. It protects the entrance to New York Harbor. About it are thousands of costly summer homes. During the World War the great guns of Sandy Hook were repeatedly fired to demonstrate their usefulness, and the effects of the concussion could be felt for many miles. It would

surprise the numerous owners of residential properties in the neighborhood of Sandy Hook (among whom is the Solicitor General) to know that the occasional firing of the Sandy Hook guns was a taking of all the summer residences in the vicinity, whose owners were temporarily and inevitably inconvenienced by the concussion. If so, the Sandy Hook fortifications would mean a loss to the Government of many millions of dollars, and it seems inconceivable that so necessary a protection for the great harbor of New York can not be maintained without the appropriation of residential properties for miles around and the payment therefor. Those who own homes in the neighborhood of fortifications for the national defense must, as good citizens, be willing to suffer a temporary inconvenience for the common welfare.

The decision of the Court of Claims should therefore be affirmed. It is hoped that this decision may end a controversy which has been too long prolonged.

JAMES M. BECK,
Solicitor General.

ROBERT P. REEDER,
Special Assistant to the Attorney General.

NOVEMBER, 1922.

()

The Supreme Court of the United States.

October Term, 1922—No. 97.

PORTSMOUTH HARBOR LAND AND HOTEL COMPANY, *et als.*, *Appellants*,

vs.

THE UNITED STATES, *Appellee.*

APPELLANTS' SUPPLEMENTARY BRIEF IN REPLY.

I. This Court has held ~~that~~ where there is a premature appeal from the Court of Claims resulting from a mistake of counsel acting under a misapprehension of fact that the Court of Claims ought to remedy the situation resulting from such premature appeal where it works prejudice to claimant. *Ex parte Roberts*, 15 Wall., 384. In this case claimant, after an adverse judgment below, filed motions for a new trial and for allowance of appeal simultaneously. While both these motions were pending counsel for claimant without assent or knowledge of the attorney of record, moved for allowance of appeal and the appeal was allowed. Realizing his mistake counsel then moved for and obtained a revocation of the allowance of appeal, the record still being in the Court of Claims. When the motion for a new trial came for hearing the court refused to entertain it on the ground that the allowance of an appeal had deprived it of jurisdiction and that the subsequent order revoking the allowance of appeal was a nullity. Claimant then moved

to strike out the allowance of appeal. This motion was denied. Mandamus was brought in this Court to require the Court of Claims to hear the motion for a new trial and to correct its records. This Court granted the mandamus, the Chief Justice saying: "It cannot be denied that the order allowing the appeal was improvidently made. It was moved for without authority, or if with authority, under a total misapprehension of fact and in disregard of the stipulation entered into by the attorneys in the cause."

II. The brief for the government fails to meet squarely the essential question whether the land in suit is now subordinated to the use of the fort and is now a mere adjunct of the fort in deprivation of its use by the owners. It is no reply to this question to argue that a single firing in 1920 does not constitute a taking. The answer which is required is whether in the light of what has developed since 1915, taking the subsequent events and present conditions in connection with the former status, this land has not been reduced to a mere adjunct of the fort? If the facts are as stated in the petition, the fort is useless without the future use of this land and the land is useless to the owners with the fort maintained as at present, because

1. To fire over it constitutes the domination *pro tanto* of the land fired over.

2. To establish and occupy fire control stations on the land is a use and occupation.

3. To point and range the guns over the land renders it impossible for human habitation with any reasonable degree of comfort.

4. To put a fort where the lay of the land in front is used as cover and hiding is unjustly to enrich the United States at the expense of the land owner where such land is ruined by the presence of a fort which always threatens to fire over it.

5. The attempt of the government to buy the land is a pretty good indication of the fact that it is needed and that the fort is no good without it. The value of this land to the owners has disappeared. Where has its value gone? It has been transferred to the United States.

III. How could a more complete taking be shown?

1. By firing guns every day—

but such frequent firing is abnormal and not to be expected. No forts anywhere do it. "Whenever it sees fit" must mean firing such as normally is done in the reasonable use of a fort of this character situated as is this fort. Such forts may be assumed to average about one shot a year more or less. If this be not enough, what would be sufficient? One shot a week? One shot a month?

A little thought shows that it is not the number of shots that constitutes the imposition of a servitude, but the shooting at irregular intervals and unforeseen times coupled with the power and will to do so at pleasure.

This we have. It would add nothing should the guns be fired every day.

2. By putting up more fire control stations on this land—

but in principle going on another's land and putting up two structures constitutes a use of that land just as much as putting up a row of houses on it. The measure of damages might vary, but a demurrer would lie as little against a claim for use and occupation for the one as for the other.

3. By purchasing the land outright—

but submitting an offer and getting an option on land is a step toward purchase and just as strongly tends to show that the would be purchaser desires the property as a consummated purchase.

4. By seizing it with a military force—

but pointing guns at it is just as effective in forcing the owners to leave it at the mercy of the government.

5. By declaring that the land is needed for the use of the fort—

but the topographic fact that the land constitutes a natural cover and masks the battery, and that the fort can only be fired over this land and not elsewhere silently shows that the fort needs this ground. Words are not needed.

IV. The government does not meet our argument, which we need not repeat in detail, and does not explain away the following points which we think we have established.

1. Normal, reasonable people will not go for pleasure to a place where they fear at any time a great gun may be fired at them.

2. The United States has gone upon this land and put in fire control stations there.

3. The United States has sought an option to buy the land, but has not bought it, presumably only because the War Department could not find the money to pay for it.

4. The United States has, after taking down the guns, re-established the same or other ten-inch guns in the same place, showing the intention to maintain this fort.

5. The land forms a natural cover for the guns.

6. The re-established guns have been fired and are pointed in simulation of firing from time to time, thus constituting a continuous threat.

We submit that it is clear that a servitude has been imposed on this land, which makes it a mere adjunct of the fort, and that it ought to be paid for and these claimants given their just rights by compensation for past use and recompensed for the value of what has been taken from them.

Respectfully submitted,

CHAUNCEY HACKETT,
Attorney for Appellants.